

NUNC PRO TUNC

JUN 13 2008

FILED

08 JUN 26 PM 12:10

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIAU.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 08 cv0017-JM (NLS)

9/2/08  
DEPUTY

DAVID BROWN,

*Petitioner,*

v.

MATTHEW CATE, Secretary of the California  
Department of Corrections and Rehabilitation,*Respondent.*NOTICE OF MOTION AND MOTION TO  
STAY THE FEDERAL  
PROCEEDINGS/ABEYANCE OR EXCUSE  
THE UNEXHAUSTED CLAIMS

TO THE HONORABLE COURT, and all parties concerned: Now comes the Petitioner, David Brown, to move for a stay of the Federal proceedings so petitioner can litigate the unexhausted claims in State Court or excuse the failed unexhausted Claims when circumstances exist that render such process ineffective to protect the rights of the applicant.

The court may grant a Stay of the Federal proceedings in which the petitioner can litigate the unexhausted claims in State Court. A sixty day Stay....

Also, the exhaustion doctrine is not jurisdictional. Granberry v. Greer (1987) 481 US 129, 107 S. CT. 1671, which can be waived by the State and to which there are certain exceptions. There is no need to give the State Courts repeated opportunities to address a Federal claim. The petitioner's claims need be presented to the State's highest court only once, and having done that, the petitioner need not repetitiously exhaust every possible avenue of State relief. See O'Sullivan v. Buerckel (1999) 526 U.S. 838, 119 S.CT. 1728. Also, see Turner v. Compoy (9<sup>th</sup> Cir 1987) 877 F.2d 526 and in re Dexter (1979)

25 C3d 921, 925 160 CR 118, Also Rose v. Lundy (1982) 455 US 509, 102 S.CT.1198, and Vasquez v. Hillery (1886) 474 US 254, 106 S. CT. 617.

#### EXCUSED EXHAUSTION AND PROCESS INEFFECTIVE TO PROTECT THE RIGHTS OF APPLICANT

The High Court has held that Federal Courts need not in all circumstances dismiss a mixed petition. Instead, Federal Courts now have power to hold such petitions in "Abeyance" pending the Petitioner's return to State Court to exhaust State remedies. See Rhine v. Weber (2005) 544 US 269, 125 S. CT. 1528. Two criteria must be met in order to obtain such a stay.

"First," the unexhausted claims must not be plainly meritless.

"Second," the Petitioner must show good cause for failing to exhaust the as yet unexhausted Claims. Also see Jackson v. Roe (9<sup>th</sup> Cir. 2005) 425 F. 3d 654, 660.

#### CIRCUMSTANCES EXCUSING FAILURE TO EXHAUST

Exhaustion is not required when circumstances exist that render such process ineffective to protect the rights of the applicant. When a defendant's sentence is very short, even the normal time frame may render the State remedy ineffective to preserve the defendant's ability to go to Federal Court. Because of the short sentence, defendant could be released from custody before completing. The Federal Court would not lose jurisdiction if the defendant was released from custody before the State Court decided the case. See Hendricks v. Zenon (9<sup>th</sup> Cir.1993) 993 F.2d 664, 672.

The granting of this motion for Stay is warranted or granting the excuse of unexhausted claims.

///

///

DECLARATION OF DAVID BROWN

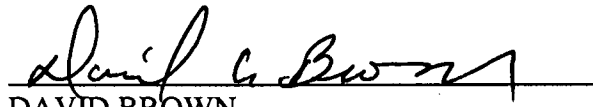
I, David Brown, do declare as follows:

- 1) That I am the defendant in said action.
- 2) That I am over the age of 18 years.
- 3) That I make this declaration in support of the Motion for Stay or Abeyance any unexhausted claims.

I, David Brown, do declare that the aforementioned is true and correct under penalty of perjury by the laws of the State of California.

Date: 6-13-2008

Respectfully Submitted,

  
DAVID BROWN  
In Pro-se

POS-030(P)

SHORT TITLE:	CASE NUMBER:
--------------	--------------

**ATTACHMENT TO PROOF OF SERVICE BY FIRST-CLASS MAIL—CIVIL (PERSONS SERVED)**

(This Attachment is for use with form POS-030)

**NAME AND ADDRESS OF EACH PERSON SERVED BY MAIL:**

<u>Name of Person Served</u>	<u>Address (number, street, city, and zip code)</u>
STATE OF CALIFORNIA ATTORNEY GENERAL	110 WEST "A" STREET # 1180 SAN DIEGO, CA. 92101
U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA	880 FRONT STREET SAN DIEGO, CA. 92101